United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1243
77-1258

To be argued by
IRVING ANOLIK

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM HOCKRIDGE, CHARLES PETRI and STEPHEN EASTON,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT WILLIAM HOCKRIDGE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM HOCKRIDGE, CHARLES PETRI, and STEPHEN EASTON,

Defendants-Appellants.

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BRIEF FOR DEFENDANT-APPELLANT HOCKRIDGE

STATEMENT

Defendant-appellant William Hockridge appeals from a judgment of the United States District Court for the Southern District of New York, rendered the 12th day of April, 1977, convicting him of violating 18 U.S.C. §656 (embezzling, abstracting, purloining, and misapplying moneys and assets of an insured bank), and of a conspiracy to do so (18 U.S.C. §371), after trial before Bonsal, D.J., and a jury.

Defendant Hockridge was sentenced to 9 months imprisonment on the conspiracy count and to 3 years imprisonment on the only substantive count of which he was convicted (Count Two), execution on which, however, was stayed with the direction that probation for a period of 3 years commence upon expiration of confinement imposed on Count One. Mr. Hockridge is at liberty on a personal recognizance bond pending the de-

termination of this appeal.

We adopt the appendix of co-appellant Easton, and the briefs of the co-appellants so far as applicable.

Defendant Hockridge, along with his co-defendants, had also been indicted on a number of counts of making false statements on applications for bank loans (18 U.S.C. §1014), and false entries in the books of the bank (18 U.S.C. §1005). Hockridge was acquitted on all of these latter counts.

INTRODUCTORY

Appellant Hockridge, at the time of the incidents, as set forth in the indictment, was a man in his late twenties, never previously in conflict with the law, and was employed by Chemical Bank in a career position. He was a loan officer. As a result of this case, he was summarily fired, but has consistently maintained his innocence and took the stand in his own defense.

The evidence against him was, for the most part, hearsay and circumstantial. As we explain, infra, the accusations of criminality contained in the indictment were conclusively refuted by documentary evidence and by direct testimony. The Court below should not have permitted this case to go to the jury with respect to Hockridge.

THE FACTUAL BACKGROUND WITH RESPECT TO HOCKRIDGE

The main thrust of the evidence against Hockridge was his alleged misapplication of funds from Chemical Bank, by whom he was employed as a loan officer. More particularly, the evidence against defendant revolved around a $14,000 check, about which the Government centered its case against Hockridge, alleging, in substance, that this was obviously a kickback to Hockridge for having approved a certain loan.

In truth and in fact, as the evidence revealed, the $14,000 was a check given to Hockridge by Nancy Petri so he could purchase 1,000 shares of Frigitemp stock. The proof at trial revealed that this sum was paid back in full together with $414 in interest. There was absolutely no evidence, therefore, that Hockridge received this money as a gift or gratuity or kickback, or for any improper purpose.

The Government also sought to link Hockridge with the signature on two cards at the Regency Hotel located on Madison Avenue in New York City. Perhaps this was to suggest possible amorous escapades on the part of the appellant. The proof, however, adduced at trial, established that the signatures on those cards were not in Hockridge's handwriting, so that, too, was just a "red herring" dragged across the case to confuse

and bemuse the jury.

Mr. Otis of the Bank of New York made a $150,000 loan, predicated much upon the bame basis as utilized by Hockridge when he approved loans to certain firms.

Otis admitted that not infrequently errors are made on the so-called "white" sheets, and further declared that he himself had made a number of mistakes in connection with loans. Otis, of course, was never charged nor indicted.

Mr. Whitney of the Petri organization admitted that he had lunch or dinner with Hockridge on perhaps forty or fifty occasions, but that he had never discussed business. Whitney had admitted lying in the grand jury and also was mistaken about supposedly giving Hockridge $980 in cash, but later admitted that he was mistaken about this.

Mr. Fillet had said that he spoke to Mr. Petri concerning defendant Hockridge within two weeks after he started working for Petri in July. Since defendant had never met Petri until September, it was obvious that Fillet was lying.

The Government sought to make much of the fact that Hockridge had acquired stock of CSPI Corporation, but it was established at trial that this stock was acquired in 1969, long before Hockridge ever met Petri. Thus, this, too, was irrelevant.

It was obvious that there were a number of conspiracies which were presented to the jurors (3369).*

Hockridge was a loan officer employed by Chemical Bank and the prosecutor sought to establish that he had received $14,000 as a result of a loan made to Today Stores, Inc. In addition, he supposedly received a fur coat for his wife and a pool table and a trip, for other services.

The proof adduced by Hockridge and by exhibits introduced into evidence established that $14,000 was a loan obtained by Hockridge from Petri's wife for investment in 1,000 shares of Frigitemp stock and that this amount was fully repaid to Petri's wife, with interest.

Also, there was proof introduced that Hockridge had made some trips with his family, but he paid $980 to cover these expenses.

We need not dwell on the extensive discussion in the case concerning any charges above Counts One and Two since defendant was acquitted of all those other counts or there were dismissals following the jury's inability to reach verdicts on some of them.

For the purpose of this record, the Court dismissed Counts

* Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

Five, Six, Seven, Fifteen, Sixteen, Eighteen, Nineteen, Twenty-One, Twenty-Three, and Twenty-Four, with the consent of the Government, on February 23, 1977.

We are adopting the arguments and recitation of facts of the co-appellants, as well as the appendix, which is being prepared by co-appellant Stephen Easton.

The thrust of the Government's case, therefore, was that Hockridge had embezzled a sum of money, namely $14,000, by virtue of a kickback which he allegedly received in connection with a loan to Today Stores, Inc.*

We have already indicated that there was a complete refutation of this allegation by concrete proof that the $14,000 was in fact repaid by Hockridge and had been advanced to him solely to enable him to buy 1,000 shares of Frigitemp stock. In fact, the loan was repaid with interest.

The Government conceded that its case was predicated primarily on circumstantial evidence (3385).

In fact, the testimony against Hockridge was virtually all hearsay and defense counsel at trial argued, in vain, that the Court should not have submitted the case to the jury (3406, 3407).

---

* This was completely refuted, but in any event, it could not have been an embezzlement from the Bank.

We are not dealing with the elaborate testimony that came into the case concerning Hockridge's preparation of so-called "white" sheets, or testimony that came in against various defendants with respect to the other counts of the indictment on which Hockridge was not convicted.

The Government took the position that Hockridge was instrumental in the approval of a number of loans based upon false financial statements and other false material and that Hockridge was fully aware of the falsity of these predicate materials upon which the loans were approved.

It boiled down, however, to the one $14,000 transaction in connection with Today Stores, Inc. loan which Hockridge established was in fact a loan to him which was fully repaid with interest.

THE ERRORS PRESENTED

There were several errors presented in this case, any one of which we maintain requires reversal.

Perhaps the foremost error, however, is the unusual occurrence during the deliberations of the jury, when two jurors, namely Jurors Nos. 3 and 4, finally obtained the ear of the Trial Judge, after having written him notes, and informed him that they had made a grave mistake by returning verdicts of guilty as to Count One against Hockridge, Easton and Petri.*

* Juror #4 was disturbed as to Easton primarily.

This unusual occurrence was precipitated by the fact that Judge Bonsal decided to take a partial verdict in open Court, during the deliberations of the jury, and before the jurors had announced that they were deadlocked in any way. It was the position of the Judge that he should take a partial verdict. It was obvious, however, that the jurors were still considering the case and, consequently, we maintain Judge Bonsal was precipitous in seeking the partial verdict before deliberations had concluded; or at least before the jury announced that they were deadlocked.

Judge Bonsal did not hold a hearing with respect to these notes, nor did he vacate the verdict. Motions for mistrial were denied.

From the foregoing, it is obvious that no unanimity had been achieved with respect to the verdict.

The second error which we present to this Court is the fact that the Court should not have submitted the case to the jury altogether since the conspiracy alleged in the indictment was by no means a single conspiracy, but constituted multiple conspiracies and, moreover, there was no argument among the alleged conspirators as to what was the object of the conspiracy (United States v. Rosenblatt, (2 Cir., 1977, Docket No. 76-1443), decided April 19, 1977).

Additionally, the evidence was of such a quality and calibre that under United States v. Taylor, 464 F.2d 240 (2 Cir., 1972), it should not have been submitted to a jury with respect to defendant Hockridge.

ARGUMENT

POINT I

DURING THE LENGTHY DELIBERATIONS OF THE JURY, AND BEFORE ANY DEADLOCK WAS ANNOUNCED BY THE VENIREMEN, OVER OBJECTION OF APPELLANT, JUDGE BONSAL TOOK A PARTIAL VERDICT, FINDING DEFENDANT HOCKRIDGE GUILTY UNDER THE CONSPIRACY COUNT, ALONG WITH PETRI AND EASTON. APPELLANT WAS SEVERELY PREJUDICED BY THE TRIAL JUDGE'S REFUSAL TO VACATE THAT CONVICTION OR TO GRANT A MISTRIAL WHEN JURORS NOS. 3 AND 4 INFORMED JUDGE BONSAL, DURING THE PENDENCY OF THE DELIBERATIONS, THAT THE VERDICT ON THE CONSPIRACY COUNT WAS NOT THEIR TRUE VERDICT, BUT HAD BEEN THE RESULT OF PRESSURE, VERBAL INTIMIDATION, AND EXHAUSTION.

During this very lengthy trial involving several defendants and a multitude of counts, it is ironic that the Court should become precipitate in its conduct concerning the reception of verdicts from the veniremen. The case lasted a number of weeks and there was a huge amount of evidence to go over.

The jury had been deliberating into the second day, but had announced no deadlock.

Over objection of defense counsel, Judge Bonsal decided to obtain any partial verdict which they may have voted. He therefore questioned the jurors as to whether or not they had arrived at a partial verdict, and received an affirmative re-

sponse from the foreman as to Count One. The verdict on that count was guilty with respect to Hockridge, Petri and Easton.

While Rule 31 of the Federal Rules of Criminal Procedure declares that a verdict may be taken in open court, it is not entirely clear as to what the procedure shall be with respect to partial verdicts where no deadlock has been announced by the jurors.

The concern of the defendants was dramatically borne out when subsequent to the deliverance of the verdict, but prior to the conclusion of the jury's deliberations, Juror No. 3, and Juror No. 4, sent notes to Judge Bonsal informing him that their verdicts as to Count One were not their true verdicts and that they had made a grave error.

The jury had been polled individually and then adjourned for the day. Juror No. 3 sent a note to Judge Bonsal reading as follows:

> "Judge Bonsal, please see me as soon as possible this morning. I feel that I have committed a grave injustice. Inasmuch as I let myself be led or rushed for lack of a better word into agreeing with the verdict of the jury. I am sorry for having let this matter continue as long as I have. Thank you, Mrs. Victoria Bruno, No. 3" (5920-5921).

Before proceeding further, it may be well to recall what the meaning of the phrase "trial by jury" actually means.

> The United States Supreme Court has ruled that the phrase 'trial by jury' means 'a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted.' The Court stated that the essential elements are threefold: "' (1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous'." (Patton v. United States, 281 U.S. 276, 70 A.L.R. 263, (1930)).

We are aware, of course, that the Supreme Court, subsequently to Patton, has held that convictions by a vote of less than twelve jurors is constitutional where an appropriate law has been passed permitting it (Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); and Williams v. Florida, 399 U.S. 78 (1970)). This series of cases has no effect on the case at bar where, obviously, unanimity is required.

Rule 606(b) of the Federal Rules of Evidence on its face would seem to preclude jurors from being questioned as to their deliberations and their reasons for voting as they did.

We maintain, however, that the Rule necessarily contemplates a situation which arises after the jury has been discharged and some question arises as to the verdict.

In the instant case, the jury was still in esse and was still in the process of deliberation. Although the time factor was a day after the verdict had been recorded, we ask rhetorically, why should this situation be any different than that where a juror, on a poll pursuant to Rule 31 of the Federal Rules of Criminal Procedure, announces that he does not agree or did not vote with the majority?

The jurors sought to retract their vote for conviction. The Court could have repolled the jury in its entirety as to this count; it could have granted a mistrial; or, it could have asked the jurors to deliberate further with respect to Count One and then poll them again.

We appreciate that the verdict on Count One had been formally recorded. If, therefore, only a mistrial would have sufficed, then a mistrial should have been declared rather than permitting a non-unanimous verdict to stand.

We maintain that it was error to have taken a partial verdict altogether in open court, since the Court could have taken a partial sealed verdict.

Judge Bonsal interviewed Jurors 3 and 4 in camera. It is manifest that these two jurors made it abundantly clear that "the verdict" on Count One had never been their true verdict, but that they had harbored a "reasonable doubt".

The colloquies were recorded in chambers, beginning on pages 5927 through 5935 of the trial transcript.

Juror number 3 clearly indicated that she had not conscientiously concluded that she was satisfied beyond a reasonable doubt as to the guilt of the three defendants under Count One.

Juror number 4 was not so convinced, at least as to Easton.

We must bear in mind that the jurors were not seeking to "change their verdicts", but announced that they had never intended to vote for conviction on that count and that is why they wanted to speak to the Judge.

Rule 606(b) F.R. Evid. provides:

> "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other jurors mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to a jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

The section refers to "Competency of Juror as Witness". The section, therefore, is not even applicable to the case at bar, contrary to what the Government successfully urged in the Court below.

No post verdict statements or interviews, so far as we know, have been taken from these jurors. The only interviews were conducted by Judge Bonsal during the pendency of the deliberations.

We believe that the rule in the Second Circuit mandated Judge Bonsal to interview the jurors in question and to preserve their statements for appellate review (Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2 Cir. 1971)).

The legislative history, as expressed by Congressman Wiggins during the debate over the adoption of Section 606(b) F.R. Evid., discloses the following:

> "...jurors have not generally been permitted to testify as to the substance or the process of their deliberations or their method of reaching a verdict. See McDonald v. Pless, 238 U.S. 264 (1914) (concerning an allegation of an improper quotient verdict), Hyde v. United States, 225 U.S. 347 (concerning an allegation of a compromise verdict arranged among the jurors),...
>
> "...First, if the internal jury deliberative process were subject to impeachment, it cannot be expected that a myriad of convicted defendants and losing civil parties would immediately seek to delay and defer impo-

> sition of sentence or judgment based upon allegation of errors within the jury's deliberative process. Given the length and relative complexity of most jury instructions, the facile attorney would have no difficulty, after a post-trial examination of jurors, in establishing allegations that particular instructions were misunderstood or misapplied by the jury. Thus, the essential goal of finality of decision would be further endangered, even in the realm of civil law. Such an increase in petitions would also serve to overburden even more heavily an already floundering court system.
>
> "Second, these investigations generated by an increased prospect of reversal through jury impeachment would inevitably serve to harass jurors through the device of insistent investigators. See for instance, Miller v. United States, 403 F.2d 77 (2nd Cir. 1968) ... Such potential for post verdict interference is hardly calculated to encourage the public to accept jury service.
>
> "Finally, if it were to become common practice that the details of jury deliberations be opened to post mortem examination, ..., this, in the words of the Supreme Court in the McDonald case (supra, at 267-268), 'would be to make what was intended to be a private deliberation the constant subject of public investigation-to the destruction of all frankness and freedom of discussion and conference'."

Congressional Record, February 6, 1974, H 550-551 (emphasis supplied).

The Senate Judiciary Committee reported:

> "Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court....
>
> "Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors, will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation...."

Report, Committee on the Judiciary of the Senate, 93rd Congress, and Session, No. 93-1277 in Federal Rules of Evidence, pp. 13-14 (1974) (emphasis supplied).

The Advisory Committee's Note on Rule 606 states:

> "The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 785, 59 L. Ed. 1300 (1915)."

The obvious reason for the adoption of Rule 606(b) to prevent post-verdict harassment of jurors by disappointed litigants, or others. See Miller v. United States, 403 F.2d 77 (2 Cir. 1968) and United States v. Green, 523 F.2d 229, 235 (2 Cir. 1975), cert. denied, 423 U.S. 1074.

In the case at bar, no public policy or interest is traduced by permitting jurors under the circumstances of this

case, to correct their votes.

It must be borne in mind that this situation is singular and that it is highly unlikely that it would happen again, except under the very rare circumstances as occurred herein. There is no threat to the integrity of the jury process and no violation of the letter and spirit of Rule 606(b).

It is obvious, moreover, that had the Court not been so precipitous, and had it refrained from taking a partial verdict until a deadlock was announced, this occurrence would likely never have happened.

It is manifest that the jurors in question were highly sensitive to their duties, and if the judicial process means anything, it requires that justice prevail over convenience.

The Supreme Court has aptly declared in Coppedge v. United States, 369 U.S. 438, at 449:

> "When society acts to deprive one its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, eminently fair and sober ...procedures. The methods we employ in the enforcement of our ...law have aptly been called the measures by which the quality of our civilization may be judged." (Emphasis ours).

We have already adverted to the fact that a verdict must be unanimous (Rule 31, Federal Rules of Criminal Procedure;

Rule 48, Federal Rules of Civil Procedure; Fifth Amendment, United States Constitution. See also, Andres v. United States, 333 U.S. 740 (1948); Hibdon v. United States, 204 F.2d 834 (6 Cir. 1953); and Grace Lines v. Motley, supra.

In Grace Lines, supra, the Second Circuit clearly indicated:

> "Of course, the rule that a juror will not be heard to impeach his own verdict, McDonald v. Pless,..., does not preclude the examination of the reasons motivating a juror's vote when that juror, after giving formal assent to the verdict and before judgment on the verdict has been entered, states in open count that he does not agree with the verdict." Id. at p. 1031.

The Court continued:

> "There is nothing to indicate that she was surrendering a conscientous conviction." Id. at p. 1032.
>
> "...there is every reason to encourage full and free discussion among jurors and their readiness to give up their views and to yield to the persuasions of their fellow jurors, so long as they do not surrender their honest convictions solely for the reason." Id. at pp. 1033-1034 (Lumbard, C.J.-concurring).

These two jurors, obviously in the minority, indicated that they had given in to pressure of other jurors, and had abandoned their honest convictions. The Court interviewed them and then sent them back to the other jurors to continue

deliberations. Such action was a tacit and implicit approval of the previous verdict and therefore an unavoidable signal to them that the Court favored the majority. The Court was, in effect, saying to the jurors that even though they had violated their oaths as jurors, they should continue as before.

The Circuit Courts have recognized the implicit coercion of such a course of events in analogous situations. Thus, when a Court has been informed of the vote of a jury, and there is a small minority of jurors disagreeing with the majority, charging an "Allen charge" is condemned as being coercive. The Second Circuit recently expressed this opinion stating that the:

> "effect is to 'unavoidably...add the judge's influence to the side of the majority...In this predictament minority jurors are likely to develop a sense of isolation and the impression that they are the special object of the judge's attention'." United States v. Sawyers, 423 F.2d 1335, 1349 (4th Cir. 1970), United States v. Robinson, 544 F.2d 611, n. 14 (2d Cir. 1976).

The Allen charge is given at such time as it appears that the jury is stymied by disagreement and its effect is to tell the jurors to try again. The Court's interview with the jurors here revealed a disagreement, and the judge told

these jurors to continue to deliberate on the remaining counts. It is unavoidable that these jurors interpreted the action of the Court as a disapproval or dissatisfaction with their position because he did nothing to remedy the verdict on Count 1. Such lack of support under the circumstances here presented renders the action of the Court coercive and so taints the deliberations that the verdicts must be set aside.

Defendant Hockridge joined in and adopted the arguments of defendant Easton contained in Point III of his memorandum submitted in support of his motion to set aside the verdict.

We do not seek to contradict the general rule which renders a juror's verdict impervious to later challenge. We are seeking a limited interpretation that would distinguish that general rule under the unusual circumstances of this case.

If the veniremen had been discharged, no doubt we would be facing an altogether different problem, but that is not the case herein.

We would also ask this Court to declare, under its supervisory power over federal courts, that the taking of partial verdicts should only be permitted when a jury has announced itself deadlocked, or where it is obvious that a mistrial will have to be declared because of a disagreement.

We maintain further that the setting aside of the verdict on Count One necessarily requires that it be set aside on Count Two as well. This is based upon the fact that the Court gave a "Pinkerton charge" and, therefore, the verdict on Count Two, in all likelihood, necessarily rested upon the predicate finding of the existence of a conspiracy.

Moreover, the jury must have found or considered that Count Two was in "furtherance of the conspiracy" since otherwise Pinkerton would not be applicable.

If the Government should argue that Dunn v. United States, 248 U.S. 390, 393, estops the defendant from alleging inconsistency among verdicts as a grounds for reversal, the Government should likewise be estopped from gleaning any meaning from the relationship of the verdicts on the various counts.

Since it is probable that the Pinkerton charge was applied, and it cannot be said beyond a reasonable doubt that it was not, a reversal on Count One should result in a reversal on Count Two (Chapman v. California, 386 U.S. 18 (1967), reh. den. 386 U.S. 987).

POINT II

THE COURT ERRED IN SUBMITTING THIS CASE TO THE JURY ALTOGETHER SINCE THERE WAS INSUFFICIENT EVIDENCE PRESENTED DURING THE TRIAL IDENTIFYING THE "ESSENTIAL NATURE" OF THE CONSPIRATORS' PLAN AND, MOREOVER, THERE WAS INSUFFICIENT EVIDENCE OF CRIMINALITY ON THE PART OF HOCKRIDGE.

In the case at bar, it is obvious that the Government relied upon hearsay and circumstances to attempt to involve Hockridge in the charge of embezzling money from Chemical Bank and of conspiring with the other defendants to do so.

For its proof, the Government primarily relied upon a $14,000. loan transaction allegedly involving Today Stores, Inc., for which the Government claimed Hockridge received a kickback of $14,000.

It was later established, through documents and through the testimony of Hockridge himself, that this $14,000. had been a loan by Mrs. Petri to Hockridge to purchase 1,000 shares of Frigitemp stock, and that this loan was repaid by Hockridge with interest.

This evidence is uncontradicted, except by innuendo, which certainly cannot substitute for hard evidence, such as documents.

In the recent case of United States v. Rosenblatt, supra,

this Court (Docket No. 76-1443, 2 Cir. April 19, 1977) reversed a conviction with instruction to dimiss the indictment on the grounds that there was insufficient evidence to establish the agreement to defraud.

It is interesting to note that perhaps the same Morris Brooks may have testified for the Government in the Rosenblatt case, as in the case at bar.

In Rosenblatt, this Court ruled that a specific agreement must be established and alleged and not some generic allegations. On slip page 3042, this Court explained:

> "We hold that when the government proceeds under the conspiracy-to-defraud clause it must plead and prove an agreement with respect to the essential nature of the alleged fraud. Thus, just as the particular offense must be specified under the 'offense' branch, Williamson v. United States, 207 U.S. 425, 447 (1908), the fraudulent scheme must be alleged and proved under the conspiracy-to-defraud clause."

In order to sustain a conviction on a charge under the first, or "offense" half of section 371, "the Government must prove at least the degree of criminal intent necessary for the substantive offense itself," United States v. Feola, 420 U.S. 671, 686, 43 L.Ed. 2d 541, 554 (1975), or, in other words, "that the defendant had the specific intent to violate the substantive statute." United States v. Cangiano, 491 F.2d

906, 909 (2d Cir.), cert. denied, 419 U.S. 904, 42 L.Ed. 2d 149 (1974). There must be "proof of an agreement to commit [the] offense." Ingram v. United States, 360 U.S. 672, 678, 3 L.Ed. 2d 1503, 1508 (1959).

In a situation where a conspiracy is prosecutable under either half of section 371, the Government has the option, as we have seen above, of choosing under which to proceed. If they opt for the "offense" half, they must prove specific intent to violate the statute involved, and an agreement to commit the offense. Could they circumvent those requirements merely by relabeling and opting to proceed under the defraud half? Logic and experience say no - the most basic concepts of justice and fairness would prohibit it. Yet, if all that is necessary to sustain a conspiracy to defraud is a naked agreement to defraud, the answer has to be yes. For under the same set of supposed facts, the burdens and elements of proof would be different, and the result might be an acquittal under the "offense" charge, and a conviction under the "defraud" charge.

An alleged conspiracy to defraud the United States must be grounded in some agreed upon common scheme or design. Since the evidence adduced and acquittals on other counts. indicate that no such agreement was reached, no conspiracy to

defraud the United States was proved. Hockridge's conviction on that charge must be reversed, and the indictment should be dismissed.

The federal conspiracy statute, 18 U.S.C. 371, requires that one or more of the conspirators must do an act to effect the object of the conspiracy.

In the case at bar, the $14,000. "kickback" allegedly given to Hockridge was a prime factor upon which the Government relied. As we have shown, however, that was not a kickback at all, but was a bonafide loan for Frigitemp stock, which was repaid with interest.

Thus, the $14,000. could not be considered an overt act.

Hockridge played no part in this conspiracy, if one existed altogether.

An act done in furtherance of a conspiracy must be within the scope of such conspiracy, which in turn is measured by the agreement purportedly entered into by the conspirators. United States v. Bowe, 360 F.2d 1,8 (2d Cir.), cert. denied, 385 U.S. 961, 17 L.Ed.2d 306 (1966), rehearing denied, 386 U.S. 969, 18 L.Ed.2d 127 (1967). The limits to which this vicarious responsibility extend were set forth in

United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938), more recently quoted with approval in United States v. Borelli, 336 F.2d 376, 385 (2d Cir. 1964), cert. denied, 279 U.S. 960, 13 L.Ed.2d 555 (1965):

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." (emphasis added)

In accord is United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944) recently quoted with approval in United States v. Greer, 467 F.2d 1064, 1070 (7th Cir. 1972), cert. denied 410 U.S. 929, 35 L.Ed.2d 590 (1973):

> "It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless he must be aware of those purposes, must accept them and their implication, if he is to be charged with what others may do in execution of them." (emphasis added)

We have previously referred to the application of the Pinkerton rule. According to the Government's reasoning, it appears that once an agreement to defraud is alleged, there need be no further agreement as to the manner of defrauding - a

conspirator would be liable for any act his co-conspirator commits in achieving that open-ended goal, since any such act would be in furtherance of the basic agreement.

For example, if Petri or Easton had decided to commit a murder in furtherance of what they conceived as the agreement, the Government would argue that under Pinkerton, Hockridge was liable for murder.

In Pinkerton v. United states, supra, 328 U.S. at 647-648, after concluding that the case involved substantive Internal Revenue violations solely by one of two conspirators, an act in furtherance of the conspiracy would be the basis for a substantive conviction of the other conspirator. The Court explained:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project.
>
> Or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement."

Hockridge was a loan officer for Chemical Bank and, understandably, it was to him that applications for loans came. Hockridge was a young man in his late twenties, and had no record of transgressing the law whatsoever.

We submit that the facts of the case at most reveal that Hockridge may have been a casual facilitator, but do not support any criminality. In this light, we ask this Court to consider United States v. Hysohion, 448 F.2d 343 at 347, (2 Cir. 1971), where this Tribunal explained:

> "We hold that this finding so jeopardizes Rimbaud's conviction on the conspiracy count as to require us to order his acquittal on that count also. We think that the district court's finding that Rimbaud was no more than 'a mere casual facilitator' negates the court's finding that Rimbaud conspired to facilitate the Roupinian-Everett sale. While it is true that one co-conspirator need not actually personally deal in or custodially possess the narcotics themselves, the Government must prove an 'unlawful agreement and an overt act committed in pursuance of the agreement.' United States v. Agueci, 310 F.2d 817, 828 (2 Cir. 1962), cert. denied, Guippone v. United States, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed. 2d 11 (1963). We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not neceslarily imply that there was an agreement between that seller, who was Roupinian, and Rimbaud."

In United States v. Peoni, 100 F.2d 401, 403 (2 Cir. 1938), Judge learned Hand explained:

> "Nobody is liable in conspiracy except for the fair import of the concerted

> purpose or agreement as he understand it."

In United States v. Andolscheck, 142 F.2d 503, 507 (2 Cir. 1944), this Court further elucidated:

> "It is true that at time courts have spoken as though, if A makes a criminal agreement with B, he becomes a party to any conspiracy into which B may enter, or may have entered, with third person. That is of course an error; the scope of the agreement actually made always measures the conspiracy, and the fact that B engages in a conspiracy with others is as irrelevant as that he engages in any other crime." (Emphasis added).

In accord with the Hysohion rule that a person not connected or just a "mere casual facilitaor" is not criminally liable, we also call this Court's attention to such cases as United States v. Vilohotti, 452 F. 2d 1186 (2 Cir. 1971); United States v. Casalinuovo, 350 F.2d 62 (2 Cir. 1971); and United States v. Euphemia, 261 F.2d 441 (2 Cir. 1958).

We stress that we maintain that there was insufficient evidence altogether to inculpate Hockridge. We advance the argument in this point only if this Court deems it necessary to reach beyond the sufficiency claim.

Notwithstanding the foregoing, we maintain that the Trial Court should have granted the motions made at the close

of the testimony and refrained from permitting this case to go to the jury altogether as to Hockridge.

We submit that this is in accord with United States v. Taylor, 464 F.2d 240 at 242, (2 Cir. 1972), where this Tribunal explained:

> "It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Captial Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent had adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence §2494 at 299 (3d ed. 1940), the best statement to the test to be that of Mr. Justice Brett in Bridges v. Railway Co. [1874] L.R. 7 H.L. 213, 233:
>
> [A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?
>
> It would seen at first blush --and we think also at second--that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal

> cases. In re Winship, 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We do not find a satisfying explanation in the Feinberg opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

We therefore ask this Court to apply not only the Rosenblatt case, but the other authorities to which we have adverted. Upon doing so, we maintain that this Court should concur in our view that the charges against Hockridge should have been dismissed and that the judgment of conviction should be reversed.

POINT III

OTHER ERRORS: THE APPELLANT WAS PREJUDICED BY THE GOVERNMENT'S WITHHOLDING OF EVIDENCE THAT THERE WAS A MAJOR INVESTIGATION OF CHEMICAL BANK WHICH RESULTED IN SEVERAL INDICTMENTS OF THE BANK AND ITS OFFICERS. IN ADDITION, THE COURT SHOULD HAVE HAVE GRANTED A MISTRIAL EARLY IN THE CASE WHEN INFORMATION CONCERNING JURORS' PREJUDICE CAME TO ITS ATTENTION. FINALLY THE COURT DID NOT ADEQUATELY CHARGE THE JURY ON THE NECESSITY OF FINDING A SPECIFIC AGREEMENT, OR AT LEAST A MEETING OF THE MINDS WITH RESPECT TO THE CONSPIRACY CHARGED.

It appeared that during the pendency of the trial the Government had knowledge that a major investigation of Chemical Bank and its officers was in progress. Subsequently, indictments were returned against that bank and some of its officials.

We maintain that such information was properly "Brady" material (Brady v. Maryland, 373 U.S. 383). We submit that as a matter of fundamental fairness this information should have been imparted to the defense (United States v. Baum, 483 F.2d 1325 (2 Cir. 1973); United States v. Addonizio, 451 F.2d 49, 64; United States v. Lipowski, 423 F.Supp. 864 (D.C. N.J., 1976); see also, Rule 803(b) F.R. Evid.). A new trial, therefore, should be granted, United States v. Rosner, 516 F.2d 269 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975); United States v. Kahn, 472 F.2d 272 (2d Cir. 1973),

cert. denied, 411 U.S. 982 (1973). Even if the government's failure to disclose had been inadvertent, a new trial must be granted because the undisclosed evidence "developed by skilled counsel ... could have induced a reasonable doubt in the minds of enought jurors to avoid a conviction." United States v. Miller, 411 F.2d 825 (2d Cir. 1969).

The evidence suppressed was the fact of an on-going investigation and pending indictment of Chemical Bank. The import of this information must be viewed in light of the nature of the charges herein, and the nature of the defense.

The indictment was based in part upon alleged misdeeds of Hockridge vis a'vis the Chemical Bank, see Indictment, Means of Conspiracy, Paragraph 5(e) and (f). Therefore, the internal mechanisms and machinations of Chemical Bank were certainly relevant to the issues at trial. In fact, part of the defense was to show the laxity of Chemical Bank procedures and thus disprove the allegations of failure to comply. The fact that Chemical Bank was under investigation for failure to comply with Federal law would have been germane. Although other alleged crimes against the bank, such as armed robbery, would not require disclosure of this information, this prosecution was of such nature as to mandate disclosure.

Early in the case the Court was informed that a juror or jurors had expressed a belief in the guilt of the defendant. The Court conducted interviews with the jurors and granted no relief. This points up the seriousness of the prejudice that occurred during the deliberations and we believe justifies the demand for a mistrial, which had been made.

Lastly, we point out in the discussion under the preceding Point, that the Trial Court erred in failing to properly explain the thrust of the conspiracy count to the jury, especially since specific requests therefor had been made (5850-5853; 5854-5868).

This Court's decision in Rosenblatt, supra, clearly supports the propriety of the requests made and exceptions taken.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, in the alternative, a new trial ordered.

Respectfully submitted,

Irving Anolik
Attorney for Defendant-Appellant
William Hockridge

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

WILLIAM HOCKRIDGE, CHARLES PETRI & STEPHEN EASTON,

Defendants-Appellanst.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the 19th *day of* October *19* 77 *at* 1 St Andrews Plaza
New York, New York

deponent served the annexed *upon*

Brief

Robert B. Fiske, Jr.
U.S. Atty-Southern Dist.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 19th
day of October, *19* 77

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979